

PLET AVERY

IBLA 81-212

Decided November 24, 1981

Appeal from decision of the Wyoming State Office, Bureau of Land Management, declaring lode mining claims abandoned and void. W MC 131971 through W MC 131983.

Reversed.

1. Federal Land Policy and Management Act of 1976: Assessment Work -- Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim

Where, on or before Oct. 22, 1979, a mining claimant files proof of assessment work for a claim located prior to Oct. 21, 1976, which proof had been duly filed in the local offices of the state wherein the notice of location was filed, but such assessment work was not performed in the assessment year preceding the filing, the claimant has complied with the statutory requirements and should be afforded an additional opportunity to comply with the regulatory requirements prior to a finding of abandonment.

APPEARANCES: Gary P. Hartman, Esq., Greybull, Wyoming, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Plet Avery appeals from the November 24, 1980, decision of the Wyoming State Office, Bureau of Land Management (BLM), which declared unpatented lode mining claims W MC 131971 through W MC 131983 abandoned and void. The BLM decision stated that appellant had not filed either evidence of annual assessment work or a notice of intention to hold the claims for the year ending December 31, 1979, in contravention of 43 CFR 3833.2-1(a) (1979) and 43 CFR 3833.4(a) (1979).

Appellant asserts on appeal only that "the assessment instrument was filed within the prescribed time period, i.e. prior to December 31, 1979."

These claims were located in 1957. On September 25, 1979, appellant recorded with BLM the notices of location as well as the affidavit of assessment work for these claims for the period from August 31, 1977, to August 31, 1978. The record also contains an affidavit of assessment work for the period from July 1, 1979, to June 30, 1980, filed with BLM on October 1, 1980. The affidavits had been duly filed with the State of Wyoming. On November 24, 1980, BLM declared the claims abandoned and void. While appellant apparently believes that the claims were declared abandoned and void for failure to file the required instrument prior to December 31, 1979, we believe that the State office was declaring it void for failure to file proof for the 1979 assessment year on or before October 22, 1979. We reverse.

[1] Section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(a) (1976), provides:

The owner of an unpatented lode or placer mining claim located prior to October 21, 1976, shall, within the three-year period following October 21, 1976, and prior to December 31 of each year thereafter, file * * *:

* * * File for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim * * *, an affidavit of assessment work performed thereon, or a detailed report provided by section 28-1 of Title 30, relating thereto.

By submitting affidavits of assessment work in 1979 and 1980, appellant did meet the statutory deadline.

The implementing regulation, however, is more specific:

The owner of an unpatented mining claim located on Federal lands on or before October 21, 1976, shall file in the proper BLM office on or before October 22, 1979, or on or before December 30 of each calendar year following the calendar year of such recording, which ever date is sooner, evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claim. [Emphasis added.]

43 CFR 3833.2-1(a). As we noted in Harry J. Pike, 57 IBLA 15 (1981), the underlined portion of this regulation is not part of the statutory language. The statute requires only that a proof of assessment work be filed. It does not specify for which year. See also Perry L. Johnson, 57 IBLA 20 (1981).

The intermingled use of the assessment year and the calendar year in this regulation presents considerable potential for confusion. As Perry L. Johnson, *supra*, illustrates:

It is crucial to remember that the assessment year, unlike the calendar year, runs from September 1 to September 1. Thus, an assessment year which runs from September 1, 1978 to September 1, 1979, is normally referred to as the 1979 assessment year. The difficulty with this regulation can be seen where an individual files his claim for recordation in June of 1979. If he seeks to file his assessment work at this time, the preceding assessment year is the 1978 assessment year, since he is presently in the 1979 assessment year. Then, if, pursuant to the statute and regulations, he files his assessment work in November of 1980, the preceding assessment year is the 1980 assessment year. Thus, this individual, who has literally followed the filing requirements, has never filed proof of assessment work for the 1979 assessment year.

57 IBLA at 21-22.

Appellant herein complied with the statute but did not comply with the underlined portion of regulation 43 CFR 3833.2-1. When, on September 25, 1979 (i.e., in the calendar year 1979), appellant filed the affidavit for the 1978 assessment year, the preceding assessment year was the 1979 assessment year. The regulation would have required a filing for the 1979 assessment year.

This failure to comply does not necessarily require a finding that appellant's claims are abandoned and void. The Court of Appeals in Topaz Beryllium Co. v. United States, 649 F.2d 775 (10th Cir. 1981), noted that failure to comply with a purely regulatory requirement should be treated as a curable defect and an individual should be afforded notice and an opportunity to submit the required supplemental information. See Harry J. Pike, *supra*. Compliance with express statutory provisions constitutes compliance with "the minimum requirements of the law and regulations." Perry L. Johnson, *supra*; Robert W. Hansen, 46 IBLA 93 (1980). Therefore, appellant should be allowed to file proof of labor for the preceding assessment year in order to cure the defective filing. Harry J. Pike, *supra*.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision

appealed from is reversed and the case file remanded to BLM for further action consistent herewith.

James L. Burski
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

